No. 92-1964

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

HEALTH CARE & RETIREMENT CORPORATION OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMERICAN NURSES ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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CONSENT TO FILING

This *amicus curiae* brief is filed pursuant to Supreme Court Rule 37.3, with the written consent of all parties in interest. Letters of consent have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

The American Nurses Association ("ANA"), a national labor organization and federation of registered nurses, consists of 53 state and territorial constituent organizations with over 200,000 members. The question before this Court is whether the National Labor Relations Board reasonably determined that a nurse's direction of less-skilled employees in the exercise of professional judg-

ment and incidental to patient care does not make a nurse a "supervisor" under Section 2(11) of the National Labor Relations Act, 29 U.S.C. § 152(11).

The answer to this question will directly affect the registered nurse members of ANA who oversee the work of less-skilled employees. ANA testified before the 80th Congress in support of the 1947 Taft-Hartley Amendment which extended the coverage of the Act to professionals such as registered nurses. Moreover, it was ANA's testimony in support of the 1974 Health Care Amendments to the Act that led to Congress' express approval of the Board test which is at issue here.[1] If the court of appeals' decision stands, almost all of the registered nurses presently represented by ANA's constituent organizations will be at risk of losing the protection of the Act.

SUMMARY OF ARGUMENT[2]

The court of appeals, relying on its prior decisions in *Beverly California Corp. v. NLRB*, 970 F.2d 1548, 1553 (6th Cir. 1992), and *NLRB v. Beacon Light Christian Nursing Home*, 825 F.2d 1076, 1079 (6th Cir. 1987), held that nurses who, in the exercise of their professional judgment in the treatment of patients, direct nurses aides in their delivery of health care, thereby act "in the interests of the employer" within the meaning of § 2(11) of the Act. The court below reached this conclusion because, in its view, it is "self-evidently in the best interest of the employer to try to do a superior job of serving the needs and interests of the employer's customers." *Beverly California Corp.*, 970 F.2d at 1553.

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[1] In this case, the Board applied the rule to licensed practical nurses, but the test applies with even more force to registered nurses who, unlike licensed practical nurses, are professionals under the Act. *See NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1466 (7th Cir. 1983); *Doctors' Hosp. of Modesto, Inc.*, 183 NLRB 950, 951 (1970), *enf'd*, 489 F.2d 772 (9th Cir. 1973); *Presbyterian Medical Ctr.*, 218 NLRB 1266, 1267 (1975).

[2] To avoid duplication, we leave it to the Petitioner National Labor Relations Board, whose position in this matter we fully support, to state the case for the Court.

Such a reading of Section 2(11) "would swallow up and displace almost the entirety of the professional-employee inclusion" (*NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 185 (1981)) as regards nurses in the health care industry. The court of appeals professed to find support for its conclusion in the Act's text and legislative history. It erred on both scores. In 1947, Congress was at pains to exclude from the coverage of the Act only those individuals who were "truly supervisory," and to extend the Act's protections to professionals like registered nurses whose work "involv[ed] the consistent exercise of discretion and judgment in its performance," and whose "special problems" and "interest in maintaining certain professional standards" could be addressed in collective bargaining.

In hearings before both the 92nd and 93rd Congress, ANA representatives urged Congress to insure that a distinction be drawn between a registered nurse's direction of other employees in the exercise of professional judgment incidental to the nurse's treatment of patients, and the exercise of supervisory authority in the interest of the employer within the meaning of Section 2(11) of the Act. In specific response to ANA's concerns, both branches of Congress noted in their respective Reports on the 1974 Health Care Amendments that existing NLRB decisions made that very distinction, and that Congress "expects the Board to continue evaluating the facts of each case in this manner when making its determinations" regarding the supervisory status of registered nurses in the health care industry. It is this very Board test (which, as this Court has held, "Congress expressly approved in 1974" (*NLRB v. Yeshiva Univ.*, 444 U.S. 672, 690 & n.30 [(1980)])) that the decision below rejects.

Affirmance of the Sixth Circuit's holding that supervision exercised in accordance with professional, rather than business norms is § 2(11) supervision, would deny the protections of the Act to virtually all registered nurses who work in hospitals and other health care facilities, contrary to the intent of the 80th Congress in enacting

§ 2(12), and the intent of the 93rd Congress which passed the 1974 Health Care Amendments. The overwhelming majority of registered nurses today give professional direction to nurses aides and other nursing personnel. Under professional standards, state regulations and canons of ethics, registered nurses give such direction and do so properly. Indeed, such direction is at the core of that practice and without it, a registered nurse cannot fully function as a professional. In short, the decision of the Sixth Circuit, unless reversed by this Court, would frustrate Congress' goal of extending the protection of the Act to registered nurses in the health care industry so as to "ameliorate [their working] conditions and elevate the standard of patient care." *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 497-98 (1978).

ARGUMENT

INTRODUCTION

This case presents the question whether the test, fashioned and consistently applied by the Board in the health care industry to resolve the tensions between the overlapping directives of §§ 2(11) and 2(12) of the National Labor Relations Act ("the Act"), has a "reasonable basis in law" and should be affirmed. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979). In Part I, we demonstrate that the Board's accommodation of the competing Sections 2(11) and 2(12) policies is consonant with, if not compelled by, the Act and its legislative history, and this Court's precedent. In Part II, we establish that the reasoning of the court of appeals would deny nurses the full panoply of rights afforded them by the Act and, if followed, would have a substantial impact on registered nurses, whose licensure and professional standards incorporate the direction of the work of less-skilled employees incidental to the nurses' treatment of patients.

I. THE DECISION BELOW CONFLICTS WITH THE ACT, ITS LEGISLATIVE HISTORY AND THIS COURT'S PRECEDENT

A. The Board's Test Is Firmly Rooted In The Text And Legislative History Of The Act

1. *The 1947 Taft-Hartley Section 2(11) and 2(12) Amendments*

In defining the term "supervisor" in § 2(11), the 1947 Congress "exercised great care, desiring that the employees [t]herein excluded from the coverage of the act be truly supervisory." S. Rep. No. 105, 80th Cong., 1st Sess. 19 (1947).[3] As regards the "professional" definition in Section 2(12), Congress in 1947 was again "careful in framing a definition to cover only strictly professional groups such as engineers, chemists, scientists, architects, and *nurses*." *Id.* (emphasis supplied).[4] Congress expressly

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[3] Section 2(11) of the Act, 29 U.S.C. § 152(11), defines a "supervisor" as any person:

> having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

[4] Section 2(12) of the Act, 29 U.S.C. § 152(12), provides that the term "professional employee" means:

> (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an

singled out professionals for coverage by the Act in part because,

> [a]lthough there has been a trend in recent years for manufacturing corporations to employ many professional persons, including architects, engineers, scientists, lawyers, and nurses, no corresponding recognition was given by Congress to their special problems. Nevertheless such employees have a great community of interest in maintaining certain professional standards.

Id. at 11.

2. *The 1974 Health Care Amendments* [5]

In the course of drafting the 1974 Health Care Amendments, the 93rd Congress considered suggestions from a number of labor organizations representing health care professionals that the § 2(11) "supervisor" definition be modified, so as either to exclude health care professionals from its reach, or to make it plain that the exercise of professional responsibilities was not "supervision" within the meaning of that Section.

These suggestions echoed those made in the 92nd Congress in connection with the House's consideration of H.R. 11357, which would also have extended coverage of the Act to nonprofit hospitals.[6] ANA testified before the

apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

[5] Health Care Amendments Act of 1974, Pub. L. No. 93-360, 88 Stat. 395 (1974).

[6] The House passed H.R. 11357 in August 1972, and forwarded it to the Senate, which intended to hold brief hearings on the bill

House Special Subcommittee on Labor of the Committee on Education and Labor in support of H.R. 11357.[7] In its testimony, ANA addressed the issue of "supervision" in the context of the professional duties of a registered nurse:

> A professional must utilize his unique skill and education within the bureaucratic structure in which he finds himself. In yesterday's world the registered nurse both developed the nursing care plan for a patient and completely carried it out. In today's health care facilities, most notably in hospitals, a number of subprofessional categories carry some of the functions involved in the care of the patient. Thus the exigencies of the modern system of the delivery of health care place the registered nurse to a certain extent in a coordinating, directing and teaching role as well as one of administering direct care. The complexity of the system requires a certain pyramiding of nurse positions to handle the various aspects of this role.

H.R. 11357 Hearings at 59.

This complexity is a function of the mix of bureaucratic and professional authority structures in health care facilities:

and obtain prompt floor action. During the Senate hearings, Senator Taft raised a number of concerns and, due to the lateness in the Session, the Senate took no further action on the House-passed bill during the 92nd Congress. An identical bill (again co-sponsored by Representatives Thompson and Ashbrook) was introduced in the House in the 93rd Congress. The 1974 Health Care Amendments were a legislative compromise among this bill and two Senate bills introduced by Senators Cranston and Javits, and Senator Taft, respectively. *See Legislative History of the Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1974*, 93d Cong., 2d Sess. 105-12, 270, 290, 457-65 (1974) (hereinafter cited as "*1974 Legislative History*").

[7] *Extension of NLRA to Nonprofit Hospital Employees: Hearings on H.R. 11357 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 1st and 2d Sess. 45, 49-64 (1972) (hereinafter cited as "H.R. 11357 Hearings") (statement of ANA officials Muriel A. Poulin and Alice L. Ahmuty).

> Most businesses are organized along bureaucratic lines: there is an hierarchic authority structure in which persons in the top-ranked positions have authority to direct the activities of those below them. In contrast, the professional model is characterized by autonomy and self-determination: * * *
>
> * * * *
>
> This organizational model mixing two authority systems has proved perfectly valid. However, it is not the model with which labor boards customarily deal, nor is it the model upon which regulations developed for bureaucratically structured industry can be successfully imposed without accommodation. This organizational context for nursing influences the relationship of the nurse to everyone else in the health care facility—to the physician, to other nurses, to subprofessionals and to the employer.

Id. at 60-61.

With respect to the application of the Section 2(11) definition of "supervisor" to the professional registered nurse, ANA official Poulin noted:

> A professional nurse, by definition of most State laws of registration, is a supervisor of the practice of a group of people, so that in nursing, for example, we have clinical supervision, which would be any professional nurse such as myself, working with a group of people responsible for your care.
>
> I am actually the professional person, you see, responsible for all your care, but I may have 10 people working with me. I am, in fact, a clinical supervisor of the area. I am not an administrative supervisor. I do not hire and fire these 10 people. If one of the 10 people is unsatisfactory and I am responsible for your care, I am going to do everything I can to make sure she doesn't work for my patients.
>
> So there is a distinction between supervision in professions and areas that are not professional.

Id. at 67.

In her prepared Statement on H.R. 11357 to the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare,[8] ANA official Munger elaborated on the distinction between § 2(11) "supervision" and the exercise of professional responsibilities:

> Almost all nurses exercise independent judgment and *professional authority* to direct other employees. Few, however, possess the "bureaucratic" authority envisioned in the NLRA definition of "supervisor"—to effectively recommend hiring, firing, promotion and discharge. In nursing, the term "supervisor" should be limited to those registered nurses who truly and substantially possess and exercise such authority over other registered nurses. In present-day hospitals, such true supervisors are typically limited to the director of nursing and her immediate assistants and associates.
>
> Whatever transitory or limited authority nurses have over other employees *is often not "supervisory," but rather a manifestation of their professional role in the nursing care of patients.* A registered nurse who leads subprofessional employees should not be considered a supervisor any more than a physician should be considered a supervisor because nurses respond to his directions, or an attorney should be considered a supervisor because a secretarial staff is available to work with him.[9]

For that reason,

> Whatever the rules for determining the supervisory status of non-professionals, *great caution must be*

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[8] As noted above, the Senate also held hearings on the House-passed H.R. 11357.

[9] *Coverage of Nonprofit Hospitals Under National Labor Relations Act, 1972: Hearings on H.R. 11357 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess. 11, 13, 15-16 (1972) (emphasis added) (hereinafter cited as "Senate Hearings on H.R. 11357") (statement of Mary Munger, R.N., Vice Chairman, ANA Commission on Economic and General Welfare).

exercised in applying those rules to professionals in order to avoid confusing the requisite judgment and discretion of professionals with the directional responsibilities of supervisors and thereby depriving the former of rights Congress intended they have. While registered nurses in the exercise of their professional responsibilities give direction and assistance to other nursing personnel such as LPN's and aides, they do not exercise true supervisory responsibilities. *Registered nurses must exercise independent judgment in making decisions in regard to patient care but only routine and minimal authority with respect to personnel matters.* The fact that, as professionals, they routinely lead the work of less skilled employees does not make them supervisors within the Act. *It is important that the responsibility of registered nurses to exercise independent judgment in supervising patient care not be confused with the question of personnel supervision under the Act.* By law, patient care supervision is a principal duty of the registered nurse.

Senate Hearings on H.R. 11357 at 17-18 (emphasis supplied).

ANA representatives took the same position in the hearings in the House and Senate on the 1974 Health Care Amendments to the Act. In her prepared Statement submitted to the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, ANA official Bonnie Graczyk stressed the difference between registered nurses' professional direction and § 2(11) supervision:

> The problem arises out of a strict interpretation of the term "supervisor" as defined in Section 2(11) of the NLRA, when applied to the work of a professional nurse. The term as originally defined was intended for application to the business or industrial setting, where a supervisor exercises a considerable amount of authority to control and direct the work of others. This is not true for the work of nurses, or for that matter, the work of all professional em-

> ployees. *Every nurse while practicing her profession exercises her own independent judgment. Legally, every nurse is responsible for her own acts. Even a doctor's order cannot immunize the nurse from such responsibility or from suit by an injured patient.* The nurse supervisor may advise and assist other nurses in their practice, but she cannot "direct" their practice. In view of this, any mechanistic interpretation of the term "supervisor" as is normally relevant and valid in business or industrial parlance *would result in the exclusion of a large number of practicing nurses from the coverage of NLRA.*
>
> The health team providing the actual care to patients within the unit may consist of several types of personnel—the nursing aide, the practical nurse and the registered nurse. The registered nurse, as the professional member of this group, provides the direction for care of the patient. * * * The nurse utilizes professional judgment in providing direct care to patients and in evaluating whether good and adequate patient care is being given by others, whether medical directives are being carried out appropriately and whether records are adequately maintained within the unit so that continuity of patient care can go on despite the shifts in personnel.[10]

ANA official Hargett's testimony in the House paralelled Ms. Graczyk's Senate testimony:

> By law, patient care supervision is a principal duty of the registered nurse. By legal definition of nursing practice in State's nursing practice acts, the registered nurse is required to assume responsibility for exercising independent judgment and discretion in relation to patient care needs.

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[10] *Coverage of Nonprofit Hospitals Under National Labor Relations Act, 1973: Hearings on S. 794 and S. 2292 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 1st Sess. 110, 120-21 (1973) (emphasis added) (statement of Bonnie P. Graczyk, R.N., Member, ANA Commission on Economic and General Welfare).

> It would make no sense, and would defy Congress' expressed intention, that registered nurses were to be accorded rights as professionals under the act, to hold that the fact of patient care supervision, which goes toward the registered nurse's professional status, also has the effect of making her a supervisor under the act.[11]

ANA official Alice L. Ahmuty, who accompanied Mr. Hargett before the House Special Subcommittee, was directed to the following statement in the House Report on H.R. 11357 (the bill which passed the House in the prior Congress) with respect to the § 2(11) issue:

> Testimony was also taken from most of the unions which represent hospital employees. They uniformly supported H.R. 11357, although the American Nurses Association urged the subcommittee to consider a special problem faced by nurses. The ANA urged that industrial concepts of "supervisor" not be carried over into the hospital industry, possibly leading to the exclusion of head nurses or charge nurses from bargaining units. These nurses are presently included in bargaining units in some States. Your committee's intent in extending NLRA coverage to nonprofit hospitals is that nurses as well as all other hospital employees enjoy the rights guaranteed to other employees covered by the act, and it is your committee's view that nurses with only nominal supervisory duties should not be considered as "supervisors" within the meaning of the National Labor Relations Act.

H.R. Rep. No. 1252, 92d Cong., 2d Sess. 5 (1972). The following colloquy then took place between Ms.

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[11] *Extension of NLRA to Nonprofit Hospital Employees: Hearings on H.R. 1236 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. 22-23 (1973) (hereinafter cited as "Hearings on H.R. 1236") (statement of Charles E. Hargett, R.N., Member, ANA Commission on Economic and General Welfare).

Ahmuty and Representatives Ashbrook and Thompson (the co-sponsors):

> MR. ASHBROOK. I have several questions. Do you think the statement in the report [on H.R. 11357] was sufficient for legislative history? Does it cover the particular problem of your relationship to the normal concepts of "supervisor"? Do you think specific language should be incorporated in the legislation?
>
> MISS AHMUTY. I would be more strongly in favor of having some specific modification of the term "supervisor" in the act as it relates specifically to registered nurses. That would be our most favored position. However, we recognize this does sometimes pose problems.
>
> MR. ASHBROOK. Those are my only questions.
>
> MR. THOMPSON. *We attempted*—and you state it in your statement—*in the report last year to deal with this problem.*
>
> *In devising the report this year we shall attempt to strengthen that language.* One major difficulty is in drafting language to include in such a bill. The second is in making legislative history, which we can do in the report and in colloquy on the floor, which would have the effect of calling the Board's attention, in the likely event this becomes law, to that particular situation.
>
> I talked with the new solicitor of the Board, who was formerly minority counsel to this committee and is a very able man. I also talked to members of the Board, and they would anticipate that even absent specific statutory language with a strong legislative history, they would be able to handle this supervisor problem. They are quite aware of it.

Hearings on H.R. 1236 at 23-24 (emphasis added).

True to Chairman Thompson's promise that the legislative history of the 1974 Health Care Amendments on this

point would be "strengthen[ed]," the House and Senate Reports both contained the following statement:

SUPERVISORS

> Various organizations representing health care professionals have urged an amendment to Section 2(11) of the Act so as to exclude such professionals from the definition of "supervisor". *The Committee has studied this definition with particular reference to health care professionals, such as registered nurses,* interns, residents, fellows, and salaried physicians *and concludes that the proposed amendment is unnecessary because of existing Board decisions.* The Committee notes that *the Board has carefully avoided applying the definition of "supervisor" to a health care professional who gives direction to other employees in the exercise of professional judgment, which direction is incidental to the professional's treatment of patients, and thus is not the exercise of supervisory authority in the interest of the employer.*
>
> *The Committee expects the Board to continue evaluating the facts of each case in this manner when making its determinations.*

S. Rep. No. 766, 93d Cong., 2d Sess. 6 (1974), and H.R. Rep. No. 1051, 93d Cong., 2d Sess. 7 (1974), *reprinted in 1974 Legislative History* at 13 & 275, respectively (emphasis added).

B. Both Congress And This Court Have Approved The Board's Longstanding Interpretation Of The Act

As this Court observed in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), the "existing Board decisions," to which the above Congressional Reports referred, recognized that:

> employees whose decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded

> from coverage even if union membership arguably may involve some divided loyalty.[30]

[30] For this reason, architects and engineers functioning as project captains for work performed by teams of professionals are deemed employees despite substantial planning responsibility and authority to direct and evaluate team members. See *General Dynamics Corp.*, 213 N.L.R.B., at 857-858; *Wurster, Bernardi & Emmons, Inc.*, 192 N.L.R.B. 1049, 1051 (1971); *Skidmore, Owings & Merrill*, 192 N.L.R.B. 920, 921 (1971). See also *Doctors' Hospital of Modesto, Inc.*, 183 N.L.R.B. 950, 951-952 (1970), enf'd, 489 F.2d 772 (CA9 1973) (nurses); *National Broadcasting Co.*, 160 N.L.R.B. 1440, 1441 (1966) (broadcast newswriters).

Id. at 690 & n.30. And, "[i]n the health-care context, the Board asks in each case whether the decisions alleged to be managerial or supervisory are 'incidental to' or 'in addition to' the treatment of patients, *a test Congress expressly approved in 1974*. S. Rep. No. 93-766, p. 6 (1974)." *Yeshiva*, 444 U.S. at 690 n.30 (emphasis added). Accordingly,

> [o]nly if an employee's activities fall *outside the scope of the duties routinely performed by similarly situated professionals* will he be found aligned with management.

Id. at 690 (emphasis added). In view of this explicit Congressional approval, this Court found that these Board decisions, including the *Doctors' Hospital of Modesto* decision on registered nurses, "accurately capture[d] the intent of Congress." *Id.*

In *Doctors' Hospital of Modesto, Inc.*, 183 NLRB 950 (1970), *enf'd*, 489 F.2d 772 (9th Cir. 1973), the Board held:

> the Employer's registered nurses are a highly trained group of professionals who normally inform other, lesser skilled, employees as to the work to be performed for patients and insure that such work is done. *But, their daily on-the-job duties and authority in this regard are solely a product of their highly*

> *developed professional skills and do not, without more, constitute an exercise of supervisory authority in the interest of their Employer.*

Id. at 951 (emphasis added). The Board's test in *Doctors' Hospital of Modesto* was routinely and uniformly applied in registered nurse cases prior to the passage of the 1974 Amendments. *See, e.g., Sherewood Enters., Inc.*, 175 NLRB 354 (1969). And, not surprisingly in view of the legislative history recounted above, this test has likewise been consistently utilized by the Board in cases decided subsequent to the 1974 Amendments. Indeed, in the first decisions involving registered nurses the Board issued subsequent to the 1974 Amendments, the Board specifically adverted to that legislative history as confirmation of the correctness of its approach. *See Wing Memorial Hosp. Ass'n*, 217 NLRB 1015 (1975); *Sutter Community Hosps. of Sacramento, Inc.*, 227 NLRB 181, 192 (1976).

The court below simply ignored this legislative history and, as Judge Posner observed in *Children's Habilitation Center, Inc. v. NLRB*, 887 F.2d 130, 134 (7th Cir. 1989), overlooked the "most important point" in this case, namely that "nurses are professionals and their exercise of supervision is guided by professional training and norms." For that reason,

> [s]upervision exercised in accordance with professional rather than business norms is not supervision within the meaning of the supervisor provision, for no issue of divided loyalties is raised when supervision is required to conform to professional standards rather than to the company's profit-maximizing objectives.

Id.

The Sixth Circuit's erroneous conclusion flowed from its failure to harmonize § 2(11) with § 2(12). Judge Posner is also instructive on this point:

> Although section 2(11)—at least its first part, up to "if"—appears to define "supervisor" broadly, the

appearance is deceptive. *Supervision in the elementary sense of directing another's work is excluded*; a supervisor under the statute must have authority over another's job tenure and other conditions of employment. *This distinction is important because the Act allows professionals—doctors, teachers, etc.—to bargain collectively, yet most professionals have some supervisory responsibilities in the sense of directing another's work—the lawyer his secretary, the teacher his teacher's aide, the doctor his nurses, the registered nurse her nurse's aide, and so on.* See *NLRB v. Yeshiva University*, 444 U.S. 672, 690 n. 30 * * * (1980). The distinction between supervision in the statutory sense and work direction by a professional is mentioned with approval in the legislative history of the 1974 Health Care Act Amendments, which put nonprofit health care institutions under the National Labor Relations Act though without amending section 2(11).

NLRB v. Res-Care, Inc., 705 F.2d 1461, 1465 (7th Cir. 1983) (emphasis added; citations omitted); *see also Children's Habilitation Center*, 887 F.2d at 131 (Section 2(11) is a "term of art" since the statutory definition "allows an employee to do some supervision without thereby becoming a supervisor under the Act. This frequently happens when the employee is a professional acting in accordance with professional norms. Examples are a lawyer directing paralegals and a registered nurse directing nurse's aides."): *Misericordia Hosp. Medical Ctr. v. NLRB*, 623 F.2d 808, 816 (2d Cir. 1980) (NLRB's test "represents an attempt by the Board to resolve the tension between the 'overlapping directives' of § 2(12) * * * and § 2(11)").

In contrast to the Sixth Circuit, which paid no heed to the critical distinction Congress drew "between supervision in the statutory sense and work direction by a professional" (*Res-Care*, 705 F.2d at 1465), the Board's test rests upon it. As we have shown, the NLRB has

routinely followed this rule, and this Court "cannot ignore this consistent, longstanding interpretation of the NLRA by the Board." *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 189-90 (1981). Indeed, such an unvarying construction of the Act by the agency charged with its execution " 'should be followed unless there are compelling indications that it is wrong, especially where Congress has refused to alter the administrative construction.' " *Id.* at 177 (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969)). Here, it is clear that Congress "intended to leave the Board's historic practice" of distinguishing between professional and supervisory responsibilities "undisturbed." *Id.* at 185. Given Congress' "acceptance of that practice" (*id.* at 190), and this Court's recognition that the NLRB's rule "accurately capture[s] the intent of Congress" (*Yeshiva*, 444 U.S. at 690), the Board's test should be affirmed as "rational and consistent" with the Act. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987).

II. THE RATIONALE OF THE COURT OF APPEALS WOULD EXCLUDE THE MAJORITY OF REGISTERED NURSES FROM THE PROTECTION OF THE ACT, CONTRARY TO THE INTENT OF SECTION 2(12) AND THE 1974 HEALTH CARE AMENDMENTS

A. Congress Enacted § 2(12) And The Health Care Amendments Specifically To Allow Registered Nurses To Bargain Collectively And To Improve Patient Care

As shown in Part I above, Congress added § 2(12) to the Act expressly to extend the statute's protections to professionals such as registered nurses, in recognition of their "special problems" and "great community of interest in maintaining certain professional standards." The 1974 Health Care Amendments were likewise designed to improve the working conditions of registered nurses in nonprofit hospitals by allowing them to bargain collectively:

> The elimination of the nonprofit-hospital exemption reflected Congress' judgment that hospital care would be improved by extending the protection of the Act to nonprofit health-care employees. Congress found that wages were low and working conditions poor in the health-care industry, and that as a result, employee morale was low and employment turnover high. Congress determined that the extension of organizational and collective-bargaining rights would ameliorate these conditions and elevate the standard of patient care.

Beth Israel Hosp. v. NLRB, 437 U.S. 483, 497-98 (1978) (footnotes omitted).

Events subsequent to the passage of the 1974 Amendments have confirmed Congress' judgment that allowing registered nurses in nonprofit hospitals to bargain collectively would help alleviate the chronic nursing shortage, ameliorate nurses' working conditions and improve patient care. In its exhaustive rulemaking proceeding on bargaining units in the health care industry (*see generally American Hosp. Ass'n v. NLRB*, —— U.S. ——, 111 S. Ct. 1539 (1991)), the Board found that:

> It is common knowledge, and the record substantiated, that currently there is an unprecedented and severe nursing shortage. Some hospitals have delegated some traditional RN functions, not reserved to RNs by law, to employees with no RN training. Additionally, hospitals currently have more seriously ill patients (higher acuity) than historically reported. Less qualified nurses, and fewer nurses, will be forced to attend to more seriously ill patients, leading to a lower level of care and more stress for the remaining RNs who may then opt out of nursing.
>
> Nurses testified that they view collective bargaining, in their own unit, as the vehicle for improve-

> ment in their working conditions and for allowing them a voice in patient care. Additionally, hospitals are trying innovative proposals for nurses: opening contracts for them alone, raising wages, setting weekend differentials.

Second Notice of Proposed Rulemaking, 53 Fed. Reg. 33,900, 33,916 (1988) (citations omitted).[12]

B. Under The Court Of Appeals' Approach, Most Registered Nurses Would Be Deprived Of Rights Guaranteed Them By The Act

In this Part, we demonstrate that the Sixth Circuit's analysis applies to all registered nurses (who comprise the overwhelming majority of professionals in hospitals), because the duties the court of appeals found "supervisory" are performed by nurses under their professional norms and state nursing regulations. As a consequence, acceptance of the Sixth Circuit's view would sweep registered nurses "outside the Act in derogation of Congress' expressed intent to protect them" in § 2(12) (*Yeshiva*, 444 U.S. at 690), so as to improve their working conditions and "elevate the standard of patient care" through collective bargaining. *Beth Israel*, 437 U.S. at 497-98.

1. *The court of appeals' decision would have widespread impact in the industry*

The number of registered nurses in health care facilities, the rapid increase in the utilization of unlicensed

[12] *See also* Final Rule, 54 Fed. Reg. 16,336, 16,341 (1989), where the Board stated:

> On January 19, 1989, the Secretary of Health and Human Services made public the report of his Commission on Nursing. This Commission was an advisory panel appointed to examine reports of a widespread shortage of registered nurses, and to make recommendations for resolving the shortage. We have examined the Commission's Report and find that it supports our observations in NPR II concerning the nursing shortage, unique problems confronting nurses, and the special need of nurses for their wage compression to be alleviated.

nursing personnel and the nurse's duty as a professional to direct the nursing tasks of these employees, all combine to make the Sixth Circuit's decision momentous for the registered nurse. We address each of these points in turn below.

First, registered nurses not only comprise approximately 23% of a hospital's *entire* workforce, but as "the largest professional group in any hospital," may "outnumber other professionals by a ratio of 4 to 1 or more," and typically constitute *80%* of the professionals in a hospital. Second Notice of Proposed Rulemaking, 53 Fed. Reg. 33,900, 33,914 (1988).

Second, in recent years there has been an exponential increase in the use by health care facilities of unlicensed nursing assistants to supplement their nursing staff.[13] This explosion is by no means over, and by the year 2000, there may be as many as 433,000 *new* jobs for nurses aides alone.[14] According to the American Hospital Association, approximately 97% of its member hospitals already employ nursing aides or nurse extenders.[15] In acute care hospitals, 82% of registered nurses work with unlicensed nurse extenders. And, in long term care facilities, such as nursing homes, 98% of nurses in such facilities are teamed with unlicensed nurse extenders.[16]

As the use of nursing aides has increased, their duties have expanded to include tasks which had historically

[13] Mary A. Blegen, *et al., Who Helps You With Your Work?*, 92(1) American Journal of Nursing 26 (January 1992).

[14] Susan C. Reinhard, *Jurisdictional Control: The Regulation of Nurses' Aides*, 9 Nursing & Health Care 373 (September 1988).

[15] Laura R. Merker, *et al., 1990 Utilization of Nurse Extenders*, American Hospital Association 3 (1991) ("AHA Study"). As this study reflects, the term "nurse extender" encompasses such positions as nurse assistant, porter/orderly, clerk/secretary, intern/nursing student, special technician and monitor technician. *Id.*

[16] Blegen, *supra* note 13, at 26-27.

been the province of the registered nurse. Thus, nursing assistants and aides may be delegated certain nursing tasks, such as the "(1) non-invasive and non-sterile treatments * * *; (2) the collecting, reporting, and documentation of data including, but not limited to: (A) vital signs, height, weight, intake and output * * *; (B) changes from baseline data established by the RN; * * * [and] (3) ambulation, positioning, and turning * * *."[17] Some assistants may also have the authority to "administer skin tests and * * * injections and to perform minor invasive procedures to withdraw blood."[18]

Third, since responsibility for total patient care rests with the registered nurse (*see* Section II.B.2 below), this nearly universal resort to nursing assistants and aides has led to equally widespread direction of these employees by registered nurses.[19] Registered nurses' direction of the work of these nursing aides and assistants in the exercise of professional judgment is incidental to their care of patients and a function of their professional responsibility. *See* Section II.B.2 below.

In light of the pervasive use of unlicensed nursing personnel in hospitals, the expanding range of these employees' duties and the registered nurses' professional obligation to direct their work in the interests of patient care, the court of appeals' rejection of the Board's rule would cast most registered nurses outside the shelter of the Act. Should that occur, nearly one-fourth of a hospital's entire workforce, and four-fifths of its professional employees, would be § 2(11) supervisors, a result which cannot be squared with the intent of either § 2(12) or the 1974 Health Care Amendments. *See Res-Care,*

[17] Texas Board of Nurse Examiners, Delegation of Selected Nursing Tasks by Registered Professional Nurses to Unlicensed Personnel, § 218 (1992); *see also* Alaska Board of Nursing, Position Statement: Activities of Unlicensed Nursing Personnel (1987).

[18] Wash. Rev. Code § 18.135.010 (1991).

[19] AHA Study, *supra* note 15, at 6, 7.

705 F.2d at 1468 (if licensed practical nurses classified as supervisors, "almost one-third of the nursing home's staff would be barred from the protections of the Act").

2. In finding nurses to be statutory supervisors with no rights under the Act, the court of appeals relied on the very duties of registered nurses that bring them within the Act's protections as professionals

The Sixth Circuit failed to recognize that "no issue of divided loyalties is raised when supervision is required to conform to professional standards rather than to the company's profit-maximizing objectives." *Children's Habilitation Center,* 887 F.2d at 134. As we show next, because state regulation and the standards of the nursing profession include such supervision as an integral part of the practice of nursing, these activities fall within "the scope of the duties routinely performed by similarly situated professionals," and do not constitute Section 2(11) "supervision." *Yeshiva,* 444 U.S. at 690.

Most state nurse practice acts, and regulations and advisory opinions promulgated thereunder, "clearly identify the registered nurse as the individual charged with the ultimate responsibility for directing the provision of nursing care," including the care given by aides.[20] Thus, in Nebraska, "[t]he practice of nursing by a registered nurse shall mean assuming responsibility and accountability for nursing actions which include * * * supervising, delegating, and evaluating nursing activities." Neb. Rev. Stat. § 71-1,132.05 (1992). Similarly, in

[20] Susan M. Kennerly, *Implications of the Use of Unlicensed Personnel: A Nursing Perspective,* 16(5) Focus on Critical Care 364, 367 (October 1989).

Nurses "are required to follow * * * state nurse practice acts" which define and regulate nursing practice. Second Notice of Proposed Rulemaking, 53 Fed. Reg. 33,900, 33,912 (1988). Authority to issue licenses, rules, regulations and advisory opinions under these acts rests with the state boards of nursing.

Indiana, a registered nurse "bears primary responsibility and accountability for nursing practices." Ind. Code Ann. § 25-23-1-1.1 (Burns 1992). And in Hawaii, the registered nurse "shall be accountable and responsible to the consumer for the quality of nursing care rendered." Haw. Rev. Stat. § 457-2 (1993); *see also* Mont. Code Ann. § 37-8-102 (1993) (same); R.I. Gen. Laws § 5-34-3 (1992) (same). Also, in Delaware, the "registered nurse * * * bears primary responsibility and accountability for nursing practices." Del. Code Ann. tit. 24, § 1902 (1992).[21]

This responsibility for the patient's total nursing care imposes an affirmative duty on the registered nurse to supervise or direct the nursing duties of nursing assistants. Indeed, the very definition of the nurse as a professional recognizes that the nurse's scope of practice "includes the teaching, direction, and supervision of less skilled person-

[21] *See also* Kentucky Board of Nursing, Advisory Opinion Statement: Roles of Nurses in the Supervision and Delegation of Nursing Acts to Unlicensed Personnel 3 (1992) ("When the registered nurse delegates selected nursing acts, the responsibility and accountability of total nursing care of an individual remains with the registered nurse."); Colorado State Board of Nursing, Rules and Regulations Regarding the Delegation of Nursing Functions, Chapter XIII, Rule 2 (1992) ("The professional nurse is responsible for and accountable * * * for the quality of nursing care he or she provides either directly or through the delegated care provided by others."); Texas Board of Nurse Examiners, Delegation of Selected Nursing Tasks by Registered Professional Nurses to Unlicensed Personnel, § 218.1 (1992) ("The registered professional nurse (RN) is responsible for the nature and quality of all nursing care that a client receives under his/her direction."); Maine Board of Nursing, Regulations Relating to Delegation by Registered Professional Nurses of Selected Nursing Services to Licensed Practical Nurses and Unlicensed Personnel, Chapter 5(1)(A) (1983) ("The registered professional nurse is responsible for the nature and quality of all nursing care that a patient receives."); Michigan Board of Nursing, Rules Regarding Delegation, Rule 104.(2) (1989) ("The registered nurse shall bear ultimate responsibility for the performance of nursing acts, functions or tasks performed by the delegatee within the scope of the delegation.").

nel in the performance of delegated nursing activities." Mich. Comp. Laws § 333.17201 (1992); *see also* Kentucky Nurse Practice Act, Ky. Rev. Stat. Ann. § 314.011 (6)(d) (Baldwin 1993) ("Registered nursing practice" is "the performance of acts requiring substantial specialized knowledge, judgment, and nursing skill" including "[t]he supervision, teaching of, and delegation to other personnel in the performance of activities relating to nursing care."); Ohio Rev. Code Ann. § 4723.02(B)(6) (Baldwin 1993) ("Practice of nursing as a registered nurse" encompasses the provision of nursing care requiring "specialized knowledge, judgment, and skill," and specifically, the "[t]eaching, administering, supervising, delegating, and evaluating nursing practice.").[22]

State boards of nursing regulations are to the same effect. *See, e.g.*, Alaska Board of Nusing, Position Statement: Activities of Unlicensed Nursing Personnel (1987) ("delegation of some nursing tasks is a legally accepted part of nursing practice"); Marvland Board of Nursing, Declaratory Ruling 92-1 (1992) ("The Board of Nursing considers it within the scope of practice of a *licensed* nurse to delegate selected nursing tasks to unlicensed personnel * * *."); Colorado State Board of

[22] *See also* Alaska Stat. § 08.68.410 (1993); Ariz. Rev. Stat. Ann. § 32-1601 (1993); Colo. Rev. Stat. § 12-38-132 (1993); Del. Code Ann. tit. 24, § 1902 (1992); D.C. Code Ann. § 2-3301.2 (1993); Fla. Stat. ch. 464.003 (1992); Ga. Code Ann. § 43-26-3 (Michie 1993); Haw. Rev. Stat. § 457-2 (1993); Ind. Code Ann. § 25-23-1-1.1 (Burns 1992); Me. Rev. Stat. Ann. tit. 32, § 2102 (West 1992); Md. Code Ann., Health-Occ. § 8-101 (1993); Minn. Stat. § 148.171 (1992); Miss. Code Ann. § 73-15-5 (1991); Mo. Rev. Stat. § 335.016 (1992); Mont. Code Ann. § 37-8-102 (1993); Neb. Rev. Stat. § 71-1, 132.05 (1992); N.H. Rev. Stat. Ann. § 326-B:2 (1992); N.M. Stat. Ann. § 61-3-3 (Michie 1993); N.C. Gen. Stat. § 90-171.20 (1992); N.D. Cent. Code § 43-12.1-02 (1993); Okla. Stat. tit. 59, § 567.3a (1992); S.C. Code Ann. § 40-33-10 (Law. Co-op. 1991); S.D. Codified Laws Ann. § 36-9-3 (1993); Tex. Rev. Civ. Stat. Ann. art. 4518 (West 1993); Utah Code Ann. § 58-31-2 (1993); Vt. Stat. Ann. tit. 26, § 1572 (1992); Wash. Rev. Code § 18.88.030 (1991); Wis. Stat. § 441.11 (1991-1992); Wyo. Stat. § 33-21-120 (1993).

Nursing, Rules and Regulations Regarding the Delegation of Nursing Functions, Chapter XIII, Rule 2 ("Supervision of personnel associated with nursing functions is included in the legal definition of the practice of professional nursing."). Accordingly, a nurse's supervision in this regard:

> is exercised in accordance with a professional judgment as to the best interests of the patient rather than a managerial judgment as to the employer's best interests. It is no different from a doctor's telling his nurses which patients to provide what care to, which is not supervision under the statute.

Res-Care, 705 F.2d at 1468.

Moreover, "[b]ecause * * * unlicensed individuals * * * function in a contributory nursing role that requires their reporting directly to nurses in the practice setting * * *," the realities of a registered nurse's duties under the scope of professional nursing practice encompass the oversight and supervision of nursing assistants and aides.[23] This supervisory role in furtherance of patient care also holds the nurse "legally accountable for assessing the capabilities of licensed and unlicensed nursing personnel to assure that only those individuals who are truly qualified are delegated responsibility for carrying out specific aspects of nursing care."[24] Such professional evaluation assessments, of course, are not indicia of § 2(11) supervisory status, but are part of the nurse's "routine discharge of professional duties." *Yeshiva*, 444 U.S. at 690 & n.30.

The ANA Code for Nurses, which sets out the canon of ethics of professional nurses, also obliges nurses appropriately to direct the work of nursing assistants in furtherance of the nurses' proper care and treatment of their patients.[25] Thus, Section 6.4 of the Code provides:

[23] Kennerly, *supra* note 20, at 367.

[24] *Id.*

[25] American Nurses Association, Code for Nurses with Interpretive Statements (1985). This Code imposes upon nurses an affirmative duty to "live[] up to the highest ethics of [this] most noble profession." *Churchill v. Waters*, 977 F.2d 1114, 1124-25 (7th Cir. 1992), *cert. granted*, 113 S. Ct. 2991 (1993).

> Inasmuch as the nurse is accountable for the quality of nursing care rendered to clients, nurses are accountable for the delegation of nursing care activities to other health workers. Therefore, the nurse must assess individual competency in assigning selected components of nursing care to other nursing service personnel. The nurse should not delegate to any member of the nursing team a function for which that person is not prepared or qualified. Employer policies or directives do not relieve the nurse of accountability for making judgments about the delegation of nursing care activities.

We submit it is nothing short of "extraordinary" for the court of appeals to rely on the professional standards, regulations and ethical obligations which make a nurse a § 2(12) professional, as its justification for finding nurses to be supervisors, if only because such a reading of the Act "would swallow up and displace almost the entirety of the professional-employee inclusion" for registered nurses. *Hendricks*, 454 U.S. at 185. This Court rejected such an approach in *Yeshiva*, and should do so again here.

CONCLUSION

For the foregoing reasons, and those set forth in the Petitioner's Brief, the judgment of the court of appeals should be reversed.

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November 16, 1993